ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL GRIFFIN, JUDGE

DIVISION III

CA07-430

January 30, 2008

MINDY CHAMBLISS
APPELLANT

AN APPEAL FROM DREW COUNTY CIRCUIT COURT
[CIV2006-116-4]

V.

HON. DON E. GLOVER, JUDGE

MELISSA WATTS-SANDERS
APPELLEE

AFFIRMED

On January 4, 2006, the Drew County Circuit Court entered an order finding that a row of trees between the properties of appellant Mindy Chambliss and appellee Melissa Watts-Sanders was established as a boundary line by acquiescence. Appellant contends that appellee failed to prove the elements of boundary by acquiescence. We disagree and affirm the decision of the circuit court.[1]

The parties share a common backyard boundary, with appellant's property located east of appellee's property. The dispute began after appellant ordered a survey, which

[1]Appellant also argues that the circuit court erred in awarding appellee possession of the disputed tract on an adverse-possession theory. As noted by appellee, however, the circuit court made no finding regarding whether appellee obtained the land through adverse possession. Accordingly, we decline to address this argument.

showed that appellee had constructed a dog pen on what the property deeds described as appellant's property. Appellee claimed property up to a row of pine trees planted on the disputed tract; however, the trees were twenty-three feet east of the surveyed boundary line. Appellant demanded that appellee remove the dog pen and threatened legal action if she failed to do so. In a letter dated July 6, 2005, appellant asserted, "The survey does superscede [sic] the fact that the property was maintained for 49 years." Eventually, appellant took possession of the disputed tract by tearing down the dog pen and a flower bed.

According to testimony from appellee's mother, Wanda Caveness, appellee's property formerly belonged to appellee's grandparents, Vivian and Loren Harris. The Harrises purchased the property in 1956 and constructed a house. Mr. Harris later planted the pine trees and developed the flower bed toward the rear of the property. Caveness stated that Mr. Harris cut the grass between the flower bed and the pine trees and that he treated the pine trees as the boundary between the two properties. She also recalled hiring someone to remove a pine tree and noted that no one objected to the removal of the tree. She was unaware of anyone except her family using the disputed area since 1956. Appellee also called J.C. Nichols, who stated that he was familiar with appellee's property and testified that in the thirteen years he lived in the area (1961-1974), he was unaware of anyone claiming the disputed tract other than the Harrises.

Appellee testified that she received the deed to the property from her grandmother in 2004. She recalled memories of going to the property at least once a week. She noted that

the pine trees were planted as close to in a line as possible and that the trees marked the boundary line between the properties. Appellant stated that her grandparents mowed the area and used the disputed area to gather debris and limbs. She was unaware of appellant mowing past the tree line prior to June 2005.

Appellant testified that she purchased her property in 2003. She stated that when she purchased her property, she thought that her property went to the concrete edging of the flower bed. She was unaware that appellee claimed possession of the disputed property until appellee placed the dog pen. Appellant stated that she questioned it, but that she "let it slide" until she had the survey performed. She claimed that she had maintained the disputed property since purchasing it in 2003 and that she never saw appellee on the property. She denied that she stopped mowing the lawn at the pine trees. Appellant also presented the testimony of Ralph Wells, who owned a rent house south of appellant's property. He denied seeing anyone using the disputed property.

On January 4, 2007, the circuit court entered an order finding that appellee had established the row of trees as the boundary by acquiescence and quieted title to the disputed property in appellee's name. It also awarded appellee $250 in damages for the cost of repairing and reconstructing the dog pen. Appellant filed a timely notice of appeal.

Although this court reviews equity cases de novo on the record, we do not reverse unless we determine that the circuit court's findings of fact were clearly erroneous. *Robertson v. Lees*, 87 Ark. App. 172, 189 S.W.3d 463 (2004). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake

has been committed. *Conner v. Donahoo*, 85 Ark. App. 43, 145 S.W.3d 395 (2004). In reviewing the lower court's findings, this court gives due deference to the circuit judge's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Id.*

Appellant argues that appellee failed to prove by a preponderance of the evidence that the pine tree line was the boundary by acquiescence. She makes three arguments: (1) the tree line was not a physical and permanent boundary; (2) there was evidence that neither appellee nor her predecessors occupied the disputed property; and (3) appellee failed to provide any testimony that any of appellant's predecessors in interest took any actions to indicate that the disputed land belonged to appellee.

The mere existence of a fence or some other line, without evidence of mutual recognition, cannot sustain a finding of boundary by acquiescence. *Warren v. Collier*, 262 Ark. 656, 559 S.W.2d 927 (1978); *Robertson*, *supra*. Silent acquiescence is sufficient, as the boundary line is usually inferred from the parties' conduct over so many years. *Warren*, *supra*; *Hicks v. Newton*, 255 Ark. 867, 503 S.W.2d 472 (1974). A boundary by acquiescence may be established without the necessity of a prior dispute or adverse use up to the line. *Rabjohn v. Ashcraft*, 252 Ark. 565, 480 S.W.2d 138 (1972). For a party to prove that a boundary line has been established by acquiescence, that party must show that both parties at least tacitly accepted the non-surveyed line as the true boundary line. The mere subjective belief that a fence is the boundary line is insufficient to establish a boundary between two properties. *Webb v. Curtis*, 235 Ark. 599, 361 S.W.2d 87 (1962).

First, appellant contends that the tree line cannot constitute a boundary line. However, the law merely requires the boundary line to be some monument (*e.g.*, a fence, turnrow, lane, or ditch) tacitly accepted as visible evidence of a dividing line. *See Ward v. Adams*, 66 Ark. App. 208, 989 S.W.2d 550 (1999) (affirming a finding that an old fence line and a pecan tree in a neighbor's yard had been used as the boundary line). The pine trees in this case can constitute a boundary line.

Next, appellant argues that neither appellee nor the Harrises occupied the disputed tract. She relies on Wells, who testified that he never saw anyone occupy the disputed tract. However, this argument ignores the other evidence showing that appellee and the Harrises did occupy that area, including evidence that Mr. Harris planted the pine trees and appellant's July 2005 letter acknowledging that appellee and the Harrises had maintained the disputed tract for forty-nine years.

Finally, with respect to appellant's argument that appellee never presented evidence showing that either she or her predecessors in interest agreed to the tree line being the boundary, appellant correctly notes that there must be conduct by landowners over many years to imply the existence of an agreement about the location of a boundary line. *See Webb*, *supra*. However, appellee presented evidence that no one other than she and her family used the disputed tract. We have held that boundary by acquiescence existed in cases where one party has used land belonging to another and the true landowner did nothing to assert his interest. *See Boyette v. Vogelpohl*, 92 Ark. App. 436, 214 S.W.3d 874 (2005) (holding that mutual recognition of a boundary line existed when both parties mowed up to

the disputed line and the true landowner asserted no interest in the disputed property until obtaining a survey); *Summers v. Dietsch*, 41 Ark. App. 52, 849 S.W.2d 3 (1993) (holding that mutual recognition of a fence as a boundary line existed when both sides maintained their property up to the fence, the true owners did not object to the use of their property, both sides maintained the fence itself, and the true owner did nothing about challenging the fence line for over a decade). In the present case, appellee and her family occupied property up to the tree line, and appellant had no objection until she had the property surveyed. Appellee's family's use of the property remained undisturbed for almost fifty years. No one objected when appellee's mother had one of the trees removed. Acquiescence can result from the silent conduct of the parties, *see Warren*, *supra*; *Hicks*, *supra*, and the fact that none of appellant's predecessors used the property east of the tree line can be seen as tacit acceptance of the tree line as the boundary between the two properties.

Though there was evidence presented to the contrary, the circuit court's finding that appellee established the tree line as the boundary by acquiescence is not clearly erroneous. Accordingly, we affirm.

Affirmed.

ROBBINS and MARSHALL, JJ., agree.